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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 120

WILLIAM WARD EHLERT, *Petitioner*

vs.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

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REPLY TO SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

I.

THE GOVERNMENT'S STATISTICS

A. The government's statistics on the "highest percentage of post-induction notice conscientious-objector claims" contained in Appendix A of the Supplemental Memorandum for the United States are of no help in determining the number of cases extant similar to Ehlert's. The government throughout this litigation has been unable to make the distinc-

tion between a late conscientious objector claim (that is to say, a claim of conscientious objector status that existed before, but was not claimed until after, the mailing of the induction notice) and a late-maturing claim (that is to say, a claim of status which did not exist until a time subsequent to the mailing of the induction notice). The government's blindness to that crucial distinction has now been statistically perpetuated; Appendix A lumps all post-induction notice claims together. Now, the reason the distinction is so crucial is because it is the nub of the case. Petitioner contends that his local board should have reopened *because* his was not a late claim but a late-maturing claim and that *therefore* he comes within the provisions of Selective Service Regulations, 32 C.F.R. §1625.2. A late claimant, as distinguished from a late-maturing claimant, might argue that his claim too should be heard by his local board (see Brief for Petitioner, p. 17, fn. 27) but he could not argue that he came within the provisions of Section 1625.2 which is what this case is all about. Thus the statistics do not tell us anything about the problem at hand.

B. Although the government's statistics do not tell us anything about late-maturing claims, they do tell us something about post-induction claims as a whole: and that is that the percentage of post-induction notice conscientious-objector claims appears to be unaffected by judicial construction of §1625.2. It will be noted that the highest percentage of post-induction claims occurs in the District of Columbia where the Circuit Court has not spoken on the question. The

next highest percentage is in New York where in *United States v. Gearey*, 368 F.2d 144 (2 Cir. 1966), the Second Circuit interpreted Section 1625.2 to include post-induction claims. New York is followed by California and Oregon where the rule of *United States v. Ehlert*, 422 F.2d 332 (9 Cir. 1970) excludes late-maturing conscientious objector claims from the ambit of §1625.2.[1] Oregon is followed by Massachusetts, where the First Circuit has not passed on the question, and Massachusetts by Washington where, once again, the rule of *Ehlert* is in force.

The lack of correlation between judicial construction of §1625.2 and the number of post-induction notice conscientious objector claims should not be surprising. Few draftees have reached that level of legal sophistication where they are familiar with opinions interpreting the regulations of administrative agencies. And we can be certain that hardly any draftees concern themselves with the possible significance of this Court's granting of a Petition for Writ of Certiorari. See Supplemental Memorandum for the United States, Appendix A, p. 5, fn. 1. Indeed, what may influence the number of post-induction notice conscientious-objection claims appears to be a mystery incapable of statistical solution. Why was the percentage of post-induction conscientious objector claims 9.67 when the call was 10,000, 4.58 when the

[1]It may be that the Ninth Circuit's *Ehlert* rule is followed in Oregon but not in California. See Brief for Petitioner, p. 28, fn. 53. If so, the almost identical percentages for California and Oregon forcefully demonstrate that Selective Service recognition of late-maturing claims has no effect on the number of post-induction notice conscientious objector claims.

call was 12,000, and 6.55 when the call was 8,000? Even the size of the draft call does not seem to be a factor. And why was the percentage so inordinately large in August? The August percentage is double that of October. And if August is factored out of the government's "national summary" equation, we discover that the overall percentage of post-induction notice conscientious-objector claims drops from 6.4% to 5.5%. The lesson is clear: if the government wants to reduce the number of post-induction conscientious-objector claims it should not draft in August. But why that should be the case nobody knows.

C. The government's statistics are also beside the point. The late claimants, no matter what their number, are not going to go away. The late-maturing claimants are surely entitled to be heard in some forum. It cannot be argued that they have slept on their rights or have waived an opportunity to raise their claim and Congress has unequivocally provided that they are not to serve. If §1625.2 is interpreted to exclude such conscientious objectors they will have no forum. As we shall demonstrate, *infra,* even these who are able to submit to induction will not be heard in the army and, of course, the Courts cannot pass upon their claim. With no forum to hear their claim, the late-maturing conscientious objectors will be prosecuted and jailed. As a consequence, the already overburdened District Courts will be inundated with numerous cases that do not belong there.

II.

THE DEPARTMENT OF DEFENSE DIRECTIVE ON CONSCIENTIOUS OBJECTORS, BY ITS TERMS, EXCLUDES CLAIMS SUCH AS EHLERT'S

In its Brief for the United States, the government said (p. 25):

> "While it is true that the claim can no longer properly be raised before the local board, it can be considered by the military immediately upon induction; the suggestion that the military would offer no relief for any conscientious objection developed between a registrant's notification and his induction is . . . 'more fancied than real. . . .'"

In its Supplemental Memorandum, the government says:

> "[T]he Department of the Army is now, and in the past has been, interpreting Department of Defense Directive No. 1300.6 in the manner indicated in our merits brief in this case (Gov't Br., pp. 24-26). A letter has been obtained from the General Counsel of the Department of the Army verifying this fact, and a copy is attached hereto as Appendix B."

When we turn to Appendix B we discover that the eagerly awaited letter says nothing of the sort. It merely describes how conscientious objector claims are handled and then, in a neat piece of evasion, states: "The present practice grants the soldier the opportunity to *file* in such cases." (Supplemental Memorandum for the United States, p. 7). (Emphasis added). A policy which permits persons to file claims is a long way from a policy stating that such claims will

be considered on the merits. A soldier can *file* in the District Court too but whether the District Court will determine that it has jurisdiction to consder the claim is a significantly different question.

We do not think that General Counsel Jordan simply expressed himself inartfully, for the government has also provided us, in Appendix C, with the pertinent Directive. That Directive establishes two classes of conscientious objector claims that will be considered by the Armed Forces: a) "Persons inducted into military service who claim to be conscientious objectors and state that they were so classified by their local board, but their records do not so indicate . . ." and b) "persons who have already served a portion of their obligated service who request discharge or noncombatant service for conscientious objection . . ." Supplemental Memorandum for the United States, Appendix C, p. 13. In other words, the Armed Services will consider, at induction, the claims of those conscientious objectors whose records do not properly reflect that they have been granted that status and no others. After induction, the army will consider those claims that have matured after military service has begun. Ehlert's case fits into neither classification and thus the directive, by its own terms, substantiates our contention that claims maturing after a notice to report for induction but before the beginning of military service are not considered by the Armed Forces. Appendix D, Army Regulation No. 635-20, also confirms that Armed Forces policy excludes consideration of claims such as Ehlert's. It states:

> "Consideration will be given to requests for separation based on bona fide conscientious objection to participation in war, in any form, *when such objection develops subsequent to entry into the military service.*"
>
> Supplemental Memorandum for the United States, Appendix D, p. 26 (emphasis added).

If the Armed Services were willing to hear claims such as Ehlert's they could say so in their letters, directives and regulations. They do not say so because in fact their policy is to the contrary. We attach, as Appendix A to this Reply, a copy of the Decision of the United States District Court, Western District of Texas, San Antonio Division, in *Grigsby v. Laird* (Civil Action No. SA70CA129), a decision rendered on May 6, 1970, two days after the grant of certiorari in this case. Grigsby's was a late-maturing claim but his case arose in the Fifth Circuit where local boards do not recognize §1625.2 as applicable to late-maturing conscientious objection claims. Therefore, Grigsby submitted to induction and applied for conscientious objector status pursuant to the Department of Defense Directive. He was turned down because his "thoughts were fixed prior to entry into the military service." The government successfully contended in the District Court that that was the proper construction of the Directive and Private Grigsby also lost on his petition for writ of habeas corpus.[2]

---

[2]We also attach, as Appendix B to this Memorandum, a reproduction of the decision of the United States Court of Appeals for the Seventh Circuit in *United States v. Nordlof*, No. 18051, January 5, 1971, which we refered to at oral argument.

III

EVEN IF THE ARMY WOULD CONSIDER CLAIMS SUCH AS EHLERT'S, IT IS NEITHER THE PROPER FORUM NOR A FORUM AVAILABLE TO THE PETITIONER

In apportioning the consideration of conscientious objector claims among forums the congressional scheme is clear, objections that mature prior to induction into the Armed Forces are to be considered by local boards. It is the local boards that have the expertise, and the primary task of removing from the manpower pool those persons whom Congress says shall not serve is theirs'. As we noted in our Reply Brief (pp. 23-24), Congress in 1967 rejected an amendment to the Selective Service Act which would have required all conscientious objectors to submit to induction and to noncombatant service. The reasons the amendment was rejected are doubtless two:

1) Since a great many conscientious objectors consider submission to induction itself inconsistent with their scruples, such a requirement would not promote the Congressional scheme for conscientious objectors. As this Court noted in *Mulloy v. United States*, ... U.S. ....., 26 L.Ed.2d 362, 368, fn. 6 (1970):

> "A sincere claimant for conscientious objector status cannot turn to the habeas corpus remedy (to challenge the legality of his classification) because his religious belief prevents him from accepting induction under any circumstances."[3]

2) Providing for Armed Services consideration of conscientious objector claims that could easily be

[3]This Court was quoting from the decision in *United States v. Freeman*, 388 F.2d 246, 249 (7 Cir. 1967).

heard elsewhere would be inefficient forum apportionment. It is not the primary task of the Armed Forces, as it is of the Selective Service Boards, to determine draft status. Assigning that task to the Armed Forces when not absolutely necessary detracts from their primary business of fighting wars. Cf. *O'Callahan v. Parker,* 395 U.S. 258, 262 (1969).

Dated, January, 1971.

Respectfully submitted,

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(Appendices Follow)

Appendix A

United States District Court
Western District of Texas
San Antonio Division

Civil Action No. SA70CA129

Private William Dickingson Grigsby

vs.

Melvin Laird as Secretary of Defense; Stanley Resor as Secretary of the Army; Major General George Ruhlen as Commanding General, Fort Sam Houston, Texas; Colonel Charles Pixley as Commanding Officer of U. S. Army Medical Training Center, Fort Sam Houston, Texas; and Major Donald Conrad as Commanding Officer of Headquarters, Headquarters Company, Receiving and Holding, Medical Training Center, Fort Sam Houston, Texas; and Local Draft Board No. 57, Selective Service System, Richmond, Virginia.

ORDER

On this the 6th day of May, 1970, came on to be considered the motion for new trial submitted by the petitioner herein, and as grounds therefor, he contends the following: (1) The judgment of the Court

is contrary to the evidence; (2) The judgment of the Court is contrary to the law; (3) The judgment of the Court is contrary to the clear weight of the evidence; (4) Because of all of the grounds set out in Private Grigsby's amended petition for habeas corpus; (5) Because Private Grigsby has been denied equal protection of the law; and (6) Because Private Grigsby's draft board in Virginia refused to rule on the merits of his conscientious objector claim, and then, thereafter, the United States Army also refused to rule on the merits of his conscientious objector claim contending that the Private's thoughts were fixed prior to entry into the military service.

There is no merit to either of the grounds set forth in the motion. With respect to ground number (6), this Court agrees with the findings of the Review Board that petitioner's beliefs became fixed prior to his entry into the active military service. In this connection the Board based its findings on the following:

> (a) Grigsby's application and the information included on the DD Form 1589 reflect that he was granted classification 1-A-O by his local draft board in September of 1968. Grigsby states in his application that after his 1-A-O classification he began to think about his participation as a noncombatant. He states "however, in the year that preceded my induction, I talked to many regarding my position I began to have doubts regarding what my real contribution to the military should be. So, when I was notified regarding my induction, I appealed my induction into the military and asked to be placed in

alternate service in a hospital somewhere. The draft board reply to my appeal was that my case had already been closed and they saw no reason to reopen it; . . ."

(b) Grigsby's application includes the 25 August 1969 letter which he wrote to his draft board requesting that he changed from classification 1-A-O to a classification which would allow him alternate service in some institution such as a civilian hospital. This letter and the admissions made cited above indicate that Grigsby's views existed prior to his entry into the active military service."

(c) The letter included from Grigsby's parents (Inclosure 5) indicates that he changed his mind concerning service as a 1-A-O prior to his entry. His parents state "as time passed, however, his conviction against killing, war and violence became even deeper. When he received his draft notice he appeared before a Selective Service Board, asking that his case be reopened and they consider assigning him to a service in an institution of some sort."

(d) Grigsby claims that his views are even stronger now than they were prior to his entry into the active military service. However, this self-serving claim is not believable since Grigsby's own admission, the letter which he wrote to his draft board, and the information provided by his parents all indicate that he made the transformation from a 1-A-O to that of a 1-O prior to his

entry into the active military service. Therefore, his application may not be favorably considered under the provisions of AR 635-20.

While petitioner indicated a change in views in his letter to his local board, dated August 25, 1969, after receipt of the order to report for induction but before he was inducted into the Army, he did not demonstrate that his beliefs were by reason of religious training and belief, rather than by reason of political, sociological, or philosophical views, or a merely personal moral code. In his letter, petitioner wholly failed to present a prima facie case, and the Draft Board was justified in its finding that there had not been a change in petitioner's status resulting from circumstances over which he had no control. See *Magaro v. Major General Cassidy, Etc.,* Opinion No. 27940 (CA 5th Cir., April 23, 1970).

In view of the foregoing, it is therefore

Ordered that petitioner's motion for new trial, be and it is hereby in all things, Denied.

Entered this 6th day of May, 1970, at San Antonio, Texas.

Adrian A. Spears,
United States District Judge

A true copy of the original, I certify.
(Seal) Dan W. Benedict, Clerk,
By Frances Mailey, Deputy.
Filed May 6, 1970,
Dan W. Benedict, Clerk,
By Frances Mailey, Deputy.

Appendix B

In the United States Court of Appeals
for the Seventh Circuit

No. 18051

September Term and Session, 1970

United States of America,
Plaintiff-Appellee,
vs.
Dwight Stuart Nordlof,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division

January 5, 1971

Before KNOCH, *Senior Circuit Judge,* KILEY and KERNER, *Circuit Judges.*

KILEY, *Circuit Judge.* Defendant Nordlof appeals from his conviction, without a jury, of refusing to submit to induction into the armed forces in violation of 50 U.S.C. App. § 462. The issue presented is

whether a Selective Service registrant's claim for conscientious objector classification made for the first time after receipt of an Order to Report for Induction may be a "change in status resulting from circumstances over which the registrant had no control" within the meaning of 32 C.F.R. § 1625.2. The district court held that such a belated claim cannot, as a matter of law, be such a change of status. We hold to the contrary, and reverse Nordlof's conviction.

Nordlof registered for the draft November 18, 1963, and was classified I-A. He was later reclassified II-S, student deferment, until August, 1968, when he was reclassified I-A. His appeal from that classification was denied. Thereafter he was ordered to report for induction on October 28, 1968. He reported, but refused to submit.

At the induction center, Nordlof wrote and presented to a Selective Service System official a six-page statement containing his claim of conscientious objection to war. Presumably Nordlof's claim did not reach, and was not considered by his local board.

On July 1, 1969, Nordlof was indicted for failure to submit to induction. Before his trial Nordlof moved for remandment to the local board for its determination on his conscientious objection claim. The motion was denied. At trial, his defense testimony[1] in support

[1]The following testimony is before us as an offer of proof. Nordlof was a high school teacher in Fort Madison, Iowa when he met Shirley Guzman in December, 1967. Miss Guzman is a Jehovah Witness and the daughter of the presiding minister of the Kingdom Hall in Fort Madison. They began to date in spring of 1968, and were later married. In August and September of 1968, Nordlof

of his conscientious objection claim was stricken on the ground that Selective Service Regulation § 1625.2 precludes a registrant from asserting his conscientious objection status after receipt of an order to report for induction. The authority for the district court's ruling was this court's decision in *United States v. Porter,* 334 F.2d 792 (7th Cir. 1964). Nordlof's main challenge is with respect to the court's determination of this issue.

Section 1625.2 provides, in relevant part:

> ". . . The classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . . unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control. 32 C.F.R. § 1625.2.

The courts of appeals are divided in their holdings on whether this section permits a local board to reopen a registrant's classification after receipt of a post-induction order conscientious objection claim.[2] This

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began discussing with Miss Guzman's father the teachings of the Bible concerning war and killing. Nordlof testified that during the month of October he began to "make his mind over" but that he was not sure of his convictions until the day of his induction when he refused to enter the army.

[2]The Fourth, Sixth and Ninth Circuits have held that a local board may not reopen upon receipt of a post-induction order conscientious objection claim. *United States v. Al-Majied Muhammad,* 364 F.2d 223 (4th Cir. 1966); *United States v. Jennison,* 402 F.2d 51 (6th Cir. 1968), *cert. denied,* 394 U.S. 912; *Ehlert v. United States,* 422 F.2d 332 (9th Cir. 1970). The Second, Third and Tenth Circuits have held to the contrary. *United States v. Gearey,* 368 F.2d 144 (2nd Cir. 1966), *cert. denied,* 389 U.S. 959 (1967); *Scott v. Volatile,* No. 18546 (3rd Cir. Sept. 15, 1970); *Keene v. United States,* 266 F.2d 378 (10th Cir. 1959).

court is in the negative camp by virtue of *United States v. Schoebel,* 201 F.2d 31 (7th Cir. 1953).

In *Schoebel* this court decided conscientious objections resulting from "the promptings of a registrant's conscience" cannot be a "change in status resulting from circumstances over which the registrant had no control;" and accordingly that Schoebel's board could not have reopened his classification under § 1625.2 on his claim made for the first time after the order to report for induction. The decision in *Porter v. United States,* 334 F.2d 792 (7th Cir. 1964), which the district court relied on in its decision against Nordlof, was based on authority of *Schoebel,* as was the earlier case of *United States v. Porter,* 314 F.2d 833 (7th Cir. 1963).

Nordlof urges that *Schoebel* should be overruled. He relies principally upon the holding of the Second Circuit in *United States v. Gearey,* 368 F.2d 144 (2nd Cir. 1966). In *Gearey,* reaffirmed in *United States v. Stafford,* 389 F.2d 215 (2nd Cir. 1968), the court held that a conscientious objector claim can "mature" or "crystallize" after a registrant has received his notice to report for induction, and that this may be a change in status resulting from circumstances over which the registrant has no control within the meaning of § 1625.2, thereby entitling him to a reopening of his classification. This holding was followed by the recent Third Circuit decision in *Scott v. Volatile,* No. 18546 (3rd Cir., September 15, 1970).

The government argues, on the other hand, that the ruling in *Schoebel* is sound and should not be over-

turned. It relies heavily upon the reasoning in the Ninth Circuit's recent *en banc* decision (five of thirteen judges dissenting) in *Ehlert v. United States,* 422 F.2d 332 (1970). The court in *Ehlert* considered, but declined to follow, the Second Circuit's decision in *Gearey.* The court stated that Ehlert as a rational human being is in "complete charge of his own thinking" and therefore a belated claim for conscientious objector classification is a circumstance within his control. The court also thought that conscientious objection claims pose more difficulty of adjudication for boards than other claims because of the necessity of determining sincerity with a depth inquiry into claimant's family life, religious training, etc. The court went on to say that if it were to follow *Gearey,* the local board would be required to determine when the registrant's beliefs crystallized, or more accurately, when the registrant claims that his beliefs crystallized; and that such a procedure would be unduly burdensome for local boards.

We cannot accept the reasoning of the *Ehlert* court. Even assuming that the majority is correct in stating that man is in complete charge of his own thinking, it does not follow that man can control his conscience. We think conscience is not the same as thinking. Webster defines conscience as "a knowledge or feeling of right and wrong, with a compulsion to do right; moral judgment that prohibits or opposes the violation of a previously recognized ethical principle."[3] Implicit in this definition is the notion that the dictates of con-

[3]Webster's New World Dictionary (1964).

science are involuntary and compulsory and outside the control of the holder of the beliefs. We can perhaps control our thinking concerning whether and to what extent a moral duty exists prior to the operation of conscience on a moral issue. We can also control, when faced with the moral issue, whether or not to follow the dictates of conscience. But, as Kant points out, when a moral issue presents itself and demands action, "then conscience speaks involuntarily and inevitably."[4] This view that conscience is beyond the control of its subject appears to us as the better view, and is borne out by eminent philosophical and theological authority.[5]

We therefore favor the views of Judge Seitz, expressed in *Scott*: "one cannot sincerely turn his conscience on and off at will;" and of Judge Merrill in his dissent in *Ehlert:* "Conscientious objection, in truth, is a contradiction of control. Just as a conviction honestly dictated by conscience cannot be banished at the will of the holder, so, conversely, a belief conveniently subject to the control of the holder is not conscientiously entertained." 422 F.2d at 339. We conclude that conscience is beyond the control of the registrant.

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[4] *Critique of Practical Reason* (Longmans ed. 1954) 311-12.

[5] S. Juergens, *Newman on the Psychology of Faith* (1928) 155-56; D. Hume, *Treatise* (Vol. 2, Everyman ed.) 313-14; H. H. Price, "Belief and Will," *Proceedings of the Aristotelian Society* (Vol. XXVIII, 1954) 14-15; Aquinas, *Summa Theologica*, Q. 79, Art. 13; Bonhoeffer, *Ethics* (SCM Press 1955) 5ff.; Jung, "A Psychological View of Conscience," *Studies in Jungian Thought: Conscience* (Northwestern Univ. 1970) 103; William James, *The Principles of Psychology* (Dover 1918) 672. *See generally* Judge Aldisert's concurring opinion in *Scott v. Volatile*, No. 18546 (3rd Cir., Sept. 15, 1970).

It is our further view that a conscientious objection belief may mature and crystallize after the registrant receives his Order to Report for Induction. The general formation of conscience is said by Freud to commence early in childhood, and development is a continuous process of meeting particular moral decisions.[6] The late Paul Tillich said "The constitution of a person as a person never comes to an end during his whole life process," it is a "process of self-integration . . . a continuous struggle with disintegration," in which he is free to develop "the moral side of the function of self-integration" in the totality of acts which face him in life.[7] This view is supported by other eminent authority.[8]

It follows that a conscientious objection to war, while developing before, can mature after, a registrant has received an Order to Report for Induction. As Judge Seitz in *Scott* states: "Although a registrant may have no conscientious objector leanings at all when he registers, his beliefs may later begin to evolve toward conscientious objection."[9] This view is impliedly accepted by the Supreme Court in *Welsh v.*

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[6]R. W. Woodward, *Psychology* (Fourth ed.) 180, 187.

[7]P. Tillich, *Systematic Theology* (Vol. 3, 1963) 32-51.

[8]Kant, *Lectures on Ethics* (Torchbook ed. 1963) 134; ....., *Philosophy of Hegel* (Modern Library ed. 1953) 258; Brennan, *The Ethics of William James* (1961) 129-38; S. Jurgens, *Newman on the Psychology of Faith* (1928) 135-37.

[9]We disagree with *Scott* to the extent that it requires, or permits, the local board to consider, in determining whether to reopen the registrant's classification, the sincerity of the registrant's beliefs. *See United States v. Mulloy*, 398 U.S. 410, 417-18 (1970); *United States v. Freeman*, 388 F.2d 246, 248-49 (7th Cir. 1967). *See also* footnote 12 *infra*.

United States, 398 U.S. 333, 336 (1970). The term of this particular development can be due, in part, to the receipt of the notice itself. As Judge Kaufman in *Gearey*, at page 150, says: "Realization that induction is pending, and that he may soon be asked to take another's life, may cause a young man finally to crystallize and articulate his once vague sentiments."

We think Nordlof's readings in the Bible and his discussions with Mr. Guzman could have given him a view different from what he previously had concerning his duty with respect to war. His conscience then could have begun to form with respect to the particular moral issue that was facing him, and might have reached its fruition only when his induction was at hand.

We conclude that crystallization of conscientious objection beliefs may be a change in status resulting from circumstances over which the registrant had no control. We therefore overrule *Schoebel* as the law of this circuit.[10]

We are not impressed by the government's argument that, practically speaking, belated crystallization is "highly improbable if not impossible." We cannot speculate that Nordlof's board upon consideration of

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[10]Since this opinion overrules *United States v. Schoebel*, 201 F.2d 31 (7th Cir. 1953), we have circulated the opinion to the active members of the court not on the panel. A majority of the court agrees that *Schoebel* should be overruled.

The decisions in *United States v. Porter*, 314 F.2d 833 (7th Cir. 1963), and *Porter v. United States*, 334 F.2d 792 (7th Cir. 1964), on the issue before us fall with *Schoebel*.

his claim would view it as "highly improbable." Moreover, such a determination goes to the merits of Nordlof's claims, which are not to be considered unless a reopening is granted. *Mulloy v. United States,* 398 U.S. 410, 416-18 (1970); *United States v. Freeman,* 388 F.2d 246, 248-49 (7th Cir. 1967).

Nor do we think the government is aided by the fact that once a claimant is inducted he has the "absolute right" to file a conscientious objection claim which, if he persuades the military to grant it, will result in discharge from combat service. This post-induction process effectually presupposes that Nordlof's claim is not sincere, for if he sincerely objected to participation in war, he would not enter the military. Moreover, Army Regulation 635-20,[11] which concerns post-induction claims for conscientious objection status made while in the army, might be interpreted to preclude claims that crystallized prior to induction but were denied by the Selective Service System because made after an induction order was mailed.

And even if a board determination of the sincerity of a conscientious objection claim is burdensome to local boards, we cannot agree with the *Ehlert* court that this is a relevant ground for turning away the

[11]Army Regulation 635-20, in paragraph 3b, provides:

Requests for discharge after entering military service will not be accepted when—

(1) Based solely on conscientious objection which existed, but which was not claimed prior to induction, enlistment, or entry on active duty or active duty for training.

(2) Based solely on conscientious objection claimed and denied by the Selective Service System prior to induction.

claim. The only question is whether a recently formed conscientious objection belief is, or may be, a change in status resulting from a circumstance which is beyond the control of the registrant, thereby entitling the registrant to a reopening. This is the criterion set forth in § 1625.2, and the only relevant inquiry is whether conscientious objection meets the criterion.

We reject also the government's argument that Nordlof had time between his registration and induction order to inform his board of his "newly acquired beliefs," and that by failure to do so has waived his right to have the board consider his claim. This argument presupposes the correctness of the *Schoebel* rule, that a crystallization of belief after induction order cannot as a matter of law amount to a circumstance over which Nordlof had no control. It also presupposes that Nordlof's conscience was formed before receipt of the induction order so as to render his claim waivable. Belatedness itself is not a good reason for refusing to consider a claim, although it is a factor a board may consider on the board's ultimate question of sincerity, once a reopening has been granted. *United States v. Gearey,* 368 F.2d at 149-50. This court's decision in *United States v. Angelico,* 427 F.2d 288 (7th Cir. 1970), therefore does not militate against our rejection of the government's waiver claim.

Finally, we see no merit in the government's contention that Nordlof did not at any time file his claim with the board. The administrative process had not terminated when he filed his claim with an official

within the Selective Service System who should have forwarded it to the board.[12] *United States v. Stafford*, 389 F.2d at 219.

The judgment is reversed.

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[12]We think the proper procedure for the board to follow in considering claims of conscientious objection made after the registrant receives an order to report for induction is as follows: The board must first consider the claim, *United States v. Shermeister*, 425 F.2d 1362 (7th Cir. 1970), and determine when the registrant's beliefs matured. If it decides—with a basis in fact in the record and assuming that the registrant's statements are true, as required by § 1625.2—that the beliefs matured before the registrant received the order or that the facts presented add no new information to the file or that the claim does not present a prima facie showing for a new classification, the claim can be denied. *See United States v. Stafford*, 389 F.2d 215, 219 (2nd Cir. 1968). If the board decides that the claim matured after receipt of the order, discloses a prima facie showing for a new classification, and is not refuted by reliable facts in the file, the board must reopen and determine the registrant's sincerity in making the claim. *Mulloy v. United States*, 398 U.S. 410, 415-16 (1970).

Under this procedure a registrant will not be able to postpone his induction indefinitely by presenting new conscientious objection claims to the officials at the induction center after his original conscientious objection claim has been denied. The induction officials must send the new claim to the local board to consider whether a reopening is warranted, *United States v. Stafford*, 389 F.2d 215 (2nd Cir. 1968), and the board must *consider* such matter, *United States v. Shermeister*, 425 F.2d 1362 (7th Cir. 1970), but the board need not reopen unless there is new evidence not previously presented, *United States v. Mulloy*, 398 U.S. 410, 418 n.7 (1970). If the board decides not to reopen, there is no administrative appeal from that decision and the board is required merely to notify the registrant of this decision, 32 C.F.R. § 1625.4, the existing Order to Report for Induction is still valid and the registrant may be indicted should he have refused to take the symbolic step forward. *See, e.g., United States v. Stone*, 3 SSLR 3053 (10th Cir. 1970); *United States v. Gearey*, 368 F.2d 144, 152 (2nd Cir. 1966). (In *Stone* the local board refused to reopen after the induction order was sent but before the registrant had reported for induction and refused to submit. We see no reason why the same procedure could not be followed after the registrant has reported but failed to submit to induction.) It is only when a reopening is granted that a prior induction order is canceled, and that a new induction order is issued after the registrant is reclassified I-A. 32 C.F.R. § 1625.14.

No. 18051

KNOCH, *Senior Circuit Judge.* (dissenting) Reluctantly I find myself in disagreement with the majority. I do not believe that our decision in *United States v. Schoebel,* 201 F. 2d 31 (7th Cir. 1953) should be overruled at this time.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.